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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re BRIANNA G., a Person  
Coming Under the Juvenile  
Court Law.

B288699  
(Los Angeles County  
Super. Ct. No.  
17CCJP01948)

LOS ANGELES COUNTY  
DEPARTMENT OF  
CHILDREN AND FAMILY  
SERVICES,

Plaintiff and Respondent,

v.

NELLY R.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Debra L. Losnick, Juvenile Court Referee. Reversed.

Richard L. Knight, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine Miles, Assistant County Counsel, and Kim Nemoy, Deputy County Counsel, for Plaintiff and Respondent.

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In this dependency case (Welf. & Inst. Code, § 300 et seq.),<sup>1</sup> Nelly R. (Mother) challenges the sufficiency of the evidence supporting the jurisdiction finding against her. We conclude the evidence presented at the adjudication hearing was insufficient to support jurisdiction and therefore reverse the finding as well as the disposition order.

### **BACKGROUND**

Mother and Kevin G. (Father) had a relationship that ended sometime in 2016. Their daughter, Brianna G., lived primarily with Mother and visited Father some weekends, under an informal custody arrangement.

#### **Detention**

In October 2017, when Brianna was three years old, Father made a referral to the Los Angeles County Department of Children and Family Services (DCFS) alleging, among other things, Mother had a history of abusing substances (alcohol, marijuana and methamphetamine), had received substance abuse treatment in the past but continued to drink alcohol, and

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<sup>1</sup> Further statutory references are to the Welfare and Institutions Code.

had appeared to be under the influence of alcohol during some custody exchanges.<sup>2</sup> DCFS had received no prior referrals concerning this family.

During October and November 2017, a DCFS social worker visited Mother and Father at their homes and interviewed them. According to the November 22, 2017 Detention Report, Mother's "home was deemed appropriate as no alcohol or drug paraphernalia were observed." Brianna appeared healthy and displayed no signs of abuse. DCFS staff who met with Mother reported that she did not appear to be under the influence of alcohol or drugs.

Mother told the social worker she had voluntarily participated in a treatment program about four years before and was arrested for driving under the influence (DUI) of alcohol in April 2017, at a time when Brianna was in Father's care.<sup>3</sup> She denied abusing alcohol and stated she had abstained from alcohol since her DUI arrest about seven months before, when she was injured in a car accident. She had been taking prescription medication for pain due to her injuries. She denied drinking alcohol when Brianna was under her care. According to the social worker, Mother stated she had "no intention to stop drinking alcohol" for all time. She agreed to submit to an on-demand alcohol and drug test, and the results came back positive

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<sup>2</sup> The referral to DCFS was anonymous, but the parties and the juvenile court concluded Father made the referral, as they indicated at the March 6, 2018 jurisdiction/disposition hearing.

<sup>3</sup> Mother was convicted for the DUI and was placed on probation.

for hydrocodone (one of her prescription medications) and negative for alcohol and all other substances.

Mother told the social worker Father was inconsistent in his visitation with Brianna, and she and Father were “in conflict” because she had “recently filed for child support.” Mother stated Father had been sending her threatening messages about her request for child support, and she showed the social worker the messages. The social worker noted in the Detention Report, Father “appears to be very upset due to the child support [issue].”

During his interview, Father told the social worker he smelled alcohol on Mother during a custody exchange (on a date not specified). When the social worker inquired why he let his daughter stay with Mother if she smelled like alcohol, Father stated he “did not want to upset [Mother] and have her become aggressive towards him.”<sup>4</sup> He claimed he contacted “law enforcement” to report the incident, but he did not know “if they responded to his call.” He also stated he had “been informed by third parties mother has men in the home and they drink.” He claimed “about a month ago he observed mother to have red eyes and [she] smelled like alcohol.” He also told the social worker “in the past” Mother drank every day.

Father asked the social worker if he would be entitled to government assistance and child support if Brianna was placed with him. He stated he was unemployed and could not pay child support. The social worker “redirected [Father] to the child abuse investigation and reminded him [DCFS] does not address

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<sup>4</sup> Mother told the social worker she was once arrested for domestic violence against Father. She was detained, but no formal charges were filed against her.

child support or public services.” The social worker noted in the Detention Report that Father “appeared to be more interested as to what financial gain he would be receiving should the child be placed under his care,” but also “expressed concerns for the well-being of the child.”

On November 21, 2017, DCFS filed a dependency petition under section 300, subdivision (b), alleging Brianna was at risk of harm based on Mother’s history of substance abuse, DUI conviction, current abuse of alcohol and prescription medication, positive toxicology screen for opiates/hydrocodone, being under the influence of alcohol and prescription medication while caring for Brianna, and Father’s failure to protect Brianna from Mother’s substance abuse. DCFS did not detain Brianna from Mother and Father.

Mother and Father appeared at the November 22, 2017 detention hearing. The juvenile court found a prima facie case for DCFS supervision and ordered Brianna to remain in parental custody. The court ordered Mother to submit to weekly, random alcohol and drug testing and enroll in a treatment program.

#### **Jurisdiction/Disposition**

On February 1, 2018, a DCFS dependency investigator interviewed Mother for the February 26, 2018 Jurisdiction/Disposition Report. Mother maintained she had not consumed alcohol since her DUI arrest and denied she abused her prescription medication. She stated she had been “an occasional drinker,” did not “drink heavily” when she was with Brianna, and was never under the influence during a custody exchange.

Regarding her DUI arrest, Mother stated she spent the night at a friend’s house after a party because she knew she had

had “too many shots” of alcohol and was unable to drive. The following morning she drove away from her friend’s house and “was hit by another car.” She was taken to the hospital for her injuries and tested above the legal limit for alcohol. Brianna was in Father’s care during this incident.

Mother also told the social worker she was first prescribed hydrocodone a couple of years before when she “was run over by a truck.” She currently took two to four pills per day, as prescribed, for pain due to a dislocated disk, a leg injury and an arm injury for which she had surgery. She also had a prescription for Xanax to treat anxiety. The dependency investigator confirmed Mother’s prescriptions were valid and current. Mother stated she was “trying to get better” because she did “not want to be on medication for the rest of her life.”

Mother also explained she was permanently disabled and had been receiving supplemental security income until her benefits were terminated. She was in the process of reapplying for benefits. A doctor’s note attached to the Jurisdiction/Disposition Report confirmed Mother’s disability was “permanent and stationary.”

DCFS reported in the Jurisdiction/Disposition Report that Mother had enrolled in a nine-month treatment program and was attending 12-step meetings as well as parenting classes. Mother denied she had an alcohol problem but expressed a willingness to comply with all court orders and stated she was benefitting from the parenting program. She had submitted to three tests for DCFS since the detention hearing, and the results on all came back positive for opiates/hydrocodone (the prescribed medication) and negative for alcohol and all other substances.

The dependency investigator was unable to interview Father for the Jurisdiction/Disposition Report because Father was in El Salvador. According to Mother, he got married in December 2017.

In a March 2, 2018 Last Minute Information for the Court, DCFS reported that it had obtained the police report from Mother's DUI arrest, and she did not tell the truth about the incident. According to the police report, Mother told an officer she had three beers on the day of the car accident/DUI arrest. As set forth above, Mother told the dependency investigator she drank alcohol the night before the car accident, not the same day. The police report also indicates the other driver was at fault in the accident for making a left turn in front of Mother. When officers arrived at the scene Mother already had been transported to the hospital. A witness reported Mother had "bloodshot watery eyes, slurred speech, odor of alcohol, [and] unsteady gait."

The Last Minute Information for the Court also summarized the social worker's March 1, 2018 interview with Father. He "stated that he separated from mother due to her drinking and due to her aggressive nature." He claimed she became violent when she drank alcohol, and "she would try to stop but she would return to drinking again." He stated that during their relationship, she "would drink from Thursday to Monday" and "would finish a bottle of hard liquor each day for about 3-4 days consecutively." He told the social worker Mother drank alcohol when she was pregnant with Brianna and observed her to be drunk when she was eight months pregnant. According to Father, a neighbor reported to him that Mother was once (date not specified) asleep in her car with Brianna because she was "too

intoxicated to go inside her apartment.” Father had no knowledge of Mother using prescription pain medication.

Father told the social worker he recalled that the date of the custody exchange when he believed Mother was under the influence and he called law enforcement to report her (discussed above) was at the end of 2016 or the beginning of 2017. This would have been at least nine months before Father made the referral and DCFS became involved in this case. Father confirmed Brianna was in his care at the time Mother was arrested for DUI.

Father also told the social worker he was making these statements because he was “legitimately concerned for his daughter’s safety,” and not because of the child support issue. He stated he asked Mother to drop her request for child support because he was “being charged interest and he would prefer to give mother money directly,” as he had in the past.

DCFS recommended the juvenile court sustain the dependency petition and leave Brianna in the parents’ care.

Mother and Father appeared at the March 5, 2018 jurisdiction/disposition hearing. The dependency investigator testified. She stated Mother was currently enrolled in a treatment program, as ordered by the criminal court after her DUI conviction. She was submitting to alcohol and drug tests for DCFS and had not missed or refused a test. Although Mother had not tested positive for alcohol, the investigator believed Mother was “minimizing how often she might be drinking and the effects that it has on her.” The investigator never observed Mother to be under the influence and did not believe Mother was abusing her pain medication. Mother was meeting all of Brianna’s needs. According to the investigator, Father reported



one incident where he believed Mother was intoxicated during a custody exchange.<sup>5</sup> The investigator did not question the truthfulness of Father's statements regarding Mother's alcohol use.

Mother also testified at the hearing. She stated she was currently enrolled in a nine-month alcohol program, as the criminal court ordered her to do, which included individual counseling. She also attended Alcoholics Anonymous meetings and parenting classes. In 2013, Mother voluntarily enrolled in a one-year, residential treatment program, which she completed. She testified she did not believe at the time that she had an alcohol problem, but she participated in the residential program because she was homeless, had a friend who graduated from the program, and believed the programming would be beneficial.

Mother stated that prior to her April 2017 DUI arrest she drank alcohol on social occasions. After the arrest, she stopped drinking alcohol entirely. She now remembered that she had one beer the morning of her DUI arrest.<sup>6</sup> She no longer drove because she did not have a car and therefore had not reinstated her driver's license. She denied ever being under the influence during a custody exchange and stated she did not have an alcohol problem.

Mother explained she began taking pain medication three years before the hearing, after she "was run over by a truck" and

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<sup>5</sup> As discussed above, that incident occurred in late 2016 or early 2017, according to Father.

<sup>6</sup> As set forth above, Mother told the police officers she had three beers that morning, and told the social workers she drank the night before the arrest, not the day of the arrest.

had surgery on her arm. In the April 2017 accident, she dislocated a disc in her lower back and required medication for her “severe” back pain. At the time of the hearing, she was taking one to two pain pills (acetaminophen/hydrocodone) per day, but her prescription allowed her to take up to four pills per day. The amount she took did not make her drowsy. She also took Xanax once a day.

During argument, DCFS and Brianna’s counsel urged the juvenile court to sustain the petition. Mother’s counsel argued there was no current risk to Brianna and asked the court to dismiss the petition. Father’s counsel asked the court to dismiss the petition as to him (the failure to protect allegation).

The juvenile court sustained the petition with the following amended finding: Mother “has a history of substance abuse and is a user of alcohol and prescription medication, which renders the mother at times unable to provide the child with regular care and supervision. On 10/18/2017, the mother had a positive toxicology screen for opiates and hydrocodone. On 10/18/2017 and on prior occasions, the mother was under the influence of prescription medication and alcohol while the child was in the mother’s care and supervision. [Father] failed to protect the child in that the father knew of the mother’s substance abuse and allowed the mother to reside in the child’s home and have unlimited access to the child. The mother has a criminal history of a conviction for Driving Under the Influence of Alcohol 0.08 percent. The child is of such a young age that the child requires constant care and supervision and mother’s substance abuse inhibits the mother’s ability to provide constant care and supervision. Such substance abuse by the mother and the father’s failure to protect the child endangers the child’s physical

health and safety and places the child at risk of serious physical harm, damage, and failure to protect.”

The juvenile court stated “the nexus is the mother’s denial that she has an alcohol issue, the fact that she is taking a rather strong drug. We all have differing reactions to pain medication, but she is taking hydrocodone and Xanax[.] [She] may not be driving right now but [she is] caring for -- in her own words -- a child that has behavioral issues, is hyperactive.”

The juvenile court declared Brianna a dependent of the court and ordered her to remain in the custody of her parents. The court also ordered DCFS to provide family maintenance services to the parents and to arrange a fetal alcohol syndrome assessment for Brianna. Mother was required to continue her treatment program and alcohol and drug testing.

On August 29, 2018, during pendency of this appeal, the juvenile court terminated dependency jurisdiction and issued an order awarding joint legal and physical custody to Mother and Father, with Brianna to reside with Mother on weekdays and with Father on weekends.<sup>7</sup> Mother does not challenge the custody order.

## **DISCUSSION**

Mother challenges the sufficiency of the evidence supporting the jurisdiction finding against her. “As a general rule, an order terminating juvenile court jurisdiction renders an appeal from a previous order in the dependency proceedings moot. [Citation.] However, dismissal for mootness in such circumstances is not automatic, but ‘must be decided on a case-

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<sup>7</sup> We granted Mother’s request for judicial notice of the August 29, 2018 juvenile court minute order and custody order.

by-case basis.’ ” (*In re C.C.* (2009) 172 Cal.App.4th 1481, 1488.) “An issue is not moot if the purported error infects the outcome of subsequent proceedings.” (*Ibid.*) Mother argues we should exercise our discretion to decide the appeal on its merits because the jurisdiction finding could prejudice her in future family law or dependency proceedings. We agree with Mother’s argument. Accordingly, we review the merits of Mother’s appeal, with no opposition from DCFS.

“In a challenge to the sufficiency of the evidence to support a jurisdictional finding, the issue is whether there is evidence, contradicted or uncontradicted, to support the finding. In making that determination, the reviewing court reviews the record in the light most favorable to the challenged order, resolving conflicts in the evidence in favor of that order, and giving the evidence reasonable inferences. Weighing evidence, assessing credibility, and resolving conflicts in evidence and in the inferences to be drawn from evidence are the domain of the trial court, not the reviewing court.” (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 450-451.)

Jurisdiction under section 300, subdivision (b), requires proof “[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child . . . .” (§ 300, subd. (b).) In deciding whether there is a substantial risk of serious physical harm, within the meaning of section 300, subdivision (b), courts evaluate the risk that is present at the time of the adjudication hearing. “While evidence of past conduct may be probative of current conditions, the question under section 300 is whether circumstances *at the time of the hearing* subject the minor to the

defined risk of harm.” (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 824, abrogated in part on another ground in *In re R.T.* (2017) 3 Cal.5th 622, 627-629.) “Jurisdiction ‘may not be based on a single episode of endangering conduct in the absence of evidence that such conduct is likely to reoccur.’” (*In re C.V.* (2017) 15 Cal.App.5th 566, 572.)

At the time of the adjudication hearing, Mother had been consistently testing negative for alcohol, and there was no evidence she was abusing her prescription medication. Her DUI arrest occurred 11 months before the hearing, at a time when Brianna was in Father’s care. The custody exchange at which Father claimed Mother appeared intoxicated occurred more than a year before the adjudication hearing. From the time Father made the referral to the date of the adjudication hearing (one year and four months), no one reported observing Mother to be under the influence. Nor did anyone dispute Mother consistently met Brianna’s needs. Any claim that Mother’s alcohol or drug use ever interfered with her care of Brianna is not supported by the record.<sup>8</sup>

We reverse the jurisdiction finding because it was not supported by sufficient evidence showing that, at the time of the adjudication hearing, Brianna was at substantial risk of suffering serious physical harm or illness as a result of Mother’s use of alcohol or prescription medication. Because there was no basis for dependency jurisdiction, we also reverse the disposition order.

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<sup>8</sup> Questions about the credibility of Mother’s statements about her past alcohol use do not establish a nexus between Mother’s use of alcohol/prescription medication and a risk of harm to Brianna at the time of the adjudication hearing.

**DISPOSITION**

The jurisdiction finding and disposition order are reversed.  
NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.